UNITED STATES
v.
JOSEPH P. McKAY (a/k/a JOSEPH P. McKAY, JR.)

IBLA 71-304 Decided October 12, 1972

Appeal from decision of Administrative Law Judge Graydon E. Holt, declaring mining claims null and void (Contest S. 1792).

Affirmed.

Mining Claims: Discovery: Generally

> To constitute a discovery of a valuable mineral deposit within a mining claim there must be a showing of sufficient mineralization to justify a prudent man in the expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine.

Mining Claims: Contests--Rules of Practice: Appeals: Burden of Proof

> In a contest against the validity of a mining claim, the Government need only establish a prima facie case that no discovery of a valuable mineral deposit has been made within the limits of the claim; the burden of proof is then upon the claimant to show with a preponderance of the evidence that the requisite discovery has been made.

Mining Claims: Discovery: Generally

> Evidence of mineralization which might warrant further exploration work within a claim rather than development of a mine is not sufficient to constitute a discovery of a valuable mineral deposit.

APPEARANCES: Joseph P. McKay, Contestee, pro se; Charles F. Lawrence, Office of the General Counsel, U.S. Department of Agriculture, San Francisco, California, for the United States, Contestant.

OPINION BY MRS. THOMPSON

The Administrative Law Judge 1/ by decision dated May 26, 1971, declared McKay's Golden Dawn Lode and Golden Dawn Placer mining claims null and void for lack of discovery of a valuable mineral deposit. He found there was an insufficient exposure of mineral to constitute a discovery. He concluded that evidence of some mineralization which might justify further exploration, rather than extraction of minerals, was insufficient.

The placer claim was located on September 19, 1947. McKay subsequently purchased the placer claim and located a lode claim on April 13, 1967, which embraced the same land. 2/ Contest proceedings were instituted against these claims by the United States on August 28, 1969. The complaint charged that:

> 1. There is not disclosed within the boundaries of the mining claims mineral materials of a variety subject to the mining laws sufficient in quantity, quality, and value to constitute a discovery.
>
> 2. The land embraced within the claims is nonmineral in character.
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> Under the mining laws (30 U.S.C. § 21 et seq. (1970)), a discovery exists
>
> * * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *.
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> Castle v. Womble, 19 L.D. 455, 457 (1894); United States v. Coleman, 390 U.S. 599 (1968).

In a contest against the validity of a mining claim the Government need only establish a prima facie case that no discovery of a valuable mineral deposit has been made within the limits of the claim. The burden of proof is then upon the claimant to overcome the Government's prima facie case by showing with a preponderance of the evidence that the requisite discovery has been made. Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959).

1/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).
2/ The claims are situated in the SW 1/4 SW 1/4 sec. 26 and the SE 1/4 SE 1/4 sec. 27, T. 25 N., R. 9 E., M.D.M., Plumas County, California, within the Plumas National Forest.

McKay asserts his reason for appeal to be:

> [a] certified Geologist has assayed our ore as being very valuable and insisted that it warranted continued exploration.

McKay did not offer in evidence at the hearing any expert testimony by a certified geologist, although he did submit assay reports of his own sampling. McKay testified that the mineralization on his claim justified continued exploration and satisfied the mining law. He acknowledged that no minerals had ever been extracted from the claim except for samples for assaying, and stated that, although both the Government's and his assay reports were low, he intended to follow the veins until he found a pocket of gold (Tr. 19, 20, 23).

The Government assays of the lode claim, which were taken at two different times, showed values of $.35, $1.05, $.70, and $4.92 per ton in gold and silver. The mineral examiner testified that the samples were taken in narrow widths which could not be working widths (Tr. 16). McKay's assays showed values of $1.05, $2.05, $1.77, and $2.45 per ton in gold. No placer samples were taken as McKay was primarily interested in the lode claim. He testified that he had no sample placer materials that amounted to anything (Tr. 23). The mineral examiner expressed his opinion that the value of the minerals exposed on the claim was not sufficient to meet the prudent man test (Tr. 16, 17). This opinion is supported by probative evidence. McKay did not refute such evidence. Indeed, most of his evidence tends to corroborate the Government's case.

The Government established its prima facie case that there was no discovery, but McKay did not meet his burden of proof. He has not shown by a preponderance of the evidence that a discovery has been made. At most, his evidence shows only that there are minute quantities of gold in his exposed cuts which may warrant further exploration work. However, evidence which may only justify further exploration to find valuable minerals, rather than development work, is not sufficient. The evidence must be such to warrant the expenditure of labor and means in the development of a valuable mine. Converse v. Udall, 399 F.2d 616, 620 (9th Cir. 1968); Henault Mining Company v. Tysk, 419 F.2d 766 (9th Cir. 1970).

McKay's appeal affords no basis for changing the decision reached by the Administrative Law Judge.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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Joan B. Thompson, Member

We concur:

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Martin Ritvo, Member

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Newton Frishberg, Chairman